IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term 1967

No. 319

NUGENT KAUTZ, et al.,
Petitioners,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON AND THE DEPARTMENT OF FISHERIES OF THE STATE OF WASHINGTON
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS

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JURISDICTION

The opinion of the Washington State Supreme Court was filed on January 12, 1967 (A. 11). The petition for Writ of Certiorari was filed on June 30, 1967, and was granted December 18, 1967. This court has jurisdiction under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Does Article 3 of the Treaty of Medicine Creek operate as a reservation of soverign rights or immunities for the petitioners from the application of valid state conservation laws?

2. Does Public Law 280 (18 U.S.C. Section 1162(b)) deprive state courts of jurisdiction to hear controversies involving the interpretation of the "usual and accustomed" hunting and fishing provisions of the treaty?

THE TREATY AND STATUTES INVOLVED

The treaty involved is known as the Treaty of Medicine Creek, 10 Stat. 1132.

The statutes involved are those of the State of Washington concerning fishery resource conservation by regulation of the time, place and manner of fishing. Anadromous fish are the subject matter of this litigation. The conservation or management responsibilities for anadromous fish has been legislatively defined to include all species of salmon as food fish and steelhead trout as game fish[1]. State laws most often violated by Indians claiming off-reserv-

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[1]The Department of Game has management responsibility for steelhead trout and the Department of Fisheries for salmon and shellfish. RCW Titles 75 and 77. Food Fish (i.e. salmon species) may be dealt with commercially while steelhead trout may not. Salmon may be taken with commercial gear (nets) in salt water under regulations promulgated by the Department of Fisheries. Steelhead trout may only be taken by hook and line under regulations promulgated by the Department of Game.

ation fishing rights are: Revised Code of Washington 75.12.060: (hereinafter referred to as RCW)

> "It shall be unlawful to construct, install, use, operate, or maintain within any waters of the state any pound net, round haul net, lampra net, fish trap, fish wheel, scow fish wheel, set net, weir, or any fixed appliance for the purpose of catching salmon, and it shall be unlawful to take salmon by any such means.";
>
> RCW 75.12.280:
>
> "It shall be unlawful for any person to install, use, operate, or maintain within any waters of the state any monofilament gill net webbing of any description for the purpose of catching salmon, and it shall be unlawful to take salmon by any such means or with such gear."; and
>
> RCW 77.16.060:
>
> "It shall be unlawful for any person to lay, set, use, or prepare any drug, poison, lime, medicated bait, nets, fish, berries, formaldehyde, dynamite, or other explosives, or any tip-up, snare or net, or trot line, or any wire, string, rope, or cable of any kind, in any waters of this state with intent thereby to catch, take or kill any game fish. It shall be unlawful to lay, set or use a net capable of taking game fish in any waters of this state except as permitted by regulation of the department of fisheries: Provided, that persons may use small landing nets or under written permit issued by the director may use nets or seines in the taking of non-game fish.
>
> Any person violating any of the provisions of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment."

STATEMENT OF THE CASE

The Respondents in their complaint (A. 2) alleged that Petitioners claimed special privileges or immunities from the application of state conservation laws and regulations to which they were not entitled and that by virtue of these claims petitioners had extensively fished the Nisqually River with set nets and drift nets and if the illegal fishing continued, the anadromous fish runs in the river would be virtually exterminated.

Respondents asked the court to declare that petitioners had no special privileges or immunities from the application of state conservation laws and that they be enjoined from further violations of state law.

Petitioners answered (A. 4) and moved to dismiss the complaint alleging the court had no jurisdiction over the petitioners or the subject matter of the action (A. 5).

Thereafter, the parties stipulated (A.6) that petitioners were beneficiaries of the Treaty of Medicine Creek; were fishing at their usual and accustomed grounds, and that should their fishery continue, it would "virtually exterminate" the anadromous fishery resource in the Nisqually River.

It was further stipulated that it "was necessary for conservation of the salmon and steelhead runs of the Nisqually River" that respondents enforce the state's conservation laws and regulations (A. 6).

On the basis of the stipulation, after argument, the trial court entered Findings of Fact and Conclusions of Law incorporating the stipulation (A. 7-9) and permanently enjoined petitioners from violating state conservation laws, rules and regulations (A. 10).

There are no factual questions before this court, it being admitted by petitioners that their fishing practices would destroy the anadromous fishery resource of the Nisqually River watershed.

SUMMARY OF ARGUMENT

I. An Indian treaty operates as a grant of Right from the United States to the Indian tribe and therefore the "In Common With All Citizens of the Territory" phrase must be given literal effect.

Aboriginal use and occupancy, sometimes referred to as "aboriginal title", does not create a compensable property right in Indians under the 5th Amendment to the Constitution. Therefore, execution of a treaty with an Indian tribe does not operate as a recognition of any pre-existing right, but is a grant of right from the United States to the tribe. *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

The right granted by the treaty to "fish in common with all citizens of the Territory" means that treaty Indians are possessed of only such rights as are all other citizens. The premise of *United States v. Winans*, 198 U.S. 371 (1905) that the treaty was

a recognition of "aboriginal title" is in error to this extent.

This conclusion is supported by the following language which appears in the treaty with the Yakima, 12 Stat. 951, in Article 3:

> ". . . . . is secured to them; as also the right, in common with citizens of the United States, to travel upon all public highways."

Absurd results on our streets and highways would obtain if the "in common" language were interpreted as a reservation of pre-existing sovereign right of the Indians as petitioners contend.

II. Assuming arguendo that treaty Indians possess special rights to fish outside their reservation boundaries, the "reasonable and necessary" test affords recognition of Indian rights and yet allows conservation of the anadromous fishery resource.

The test applied in the opinion below and in *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963) is the same rationale used by this court in *Tulee v. Washington*, 315 U.S. 681 (1942).

It allows the state to prohibit certain types of fishing practices when it can show the resource is being endangered by net fishing at critical times in certain areas.

The "indispensability test" of *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963) prohibits any conservation until the Indians have taken all but the last fish. It would effectively destroy the economic and

recreational value of the resource. The "indispensability" standard is not workable in terms of the conservation needs of the resource because it leaves an Indian commercial fishery, using modern nylon monofilament nets, subject to no meaningful management or control.

III. Public Law 280 does not operate as a congressional recognition of Indian fishing rights.

18 U.S.C. 1162(b) concerns only assumption of state jurisdiction over Indian reservations for particular purposes and specifically excludes any effect on Indian fishing. Congress has not purported to define the quantum of off-reservation fishing or hunting rights secured to Indian tribes under any treaty.

ARGUMENT

I. *An Indian Treaty Operates As A Grant of Right From The United States To The Indian Tribe and Therefore The "In Common With All Citizens of The Territory" Phrase Must Be Given Literal Effect.*

The Constitution declares a treaty to be the supreme law of the land. U.S. Const., Art 6. There is no question that the federal government may limit a state's police power by treaty. *Missouri v. Holland*, 252 U.S. 416 (1920).

Treaties with the various Indian tribes of the United States are distinguishable from international agreements to which the United States is a party because they deal with citizen-nationals wholly within the geographical and jurisdictional limits of

the United States. 8 U.S.C. 1401(a) (1958). The distinction between international agreements and Indian treaties was first drawn by Chief Justice Marshall in *Worcester v. Georgia*, 31 U.S. 515 (1832) which held that the Indian tribes were *dependent* sovereigns and were not subject to the laws of the United States or of a state within the boundaries of their treaty-created reservations unless expressly made so by Congress.

The federal government has, since 1871, been foreclosed by act of Congress from making new treaties with Indian tribes. 16 Stat. 544, 566; 25 U.S.C. 71. The notion of complete internal sovereignty of Indian tribes has undergone erosion due to the continuing impact of the dominant Western-European civilization.

Under certain circumstances, state governments have been permitted to assume jurisdiction over Indian reservations for certain purposes. Public Law 280, 67 Stat. 588 (1953); 18 U.S.C. 1162; 28 U.S.C. 1360 (1958).

Indian reservations are something of an anomaly in our system of government. It would appear that they are "federal municipalities". *Wheeler-Howard Act*, 48 Stat. 984 (1934); 25 U.S.C. 461, et seq. The *Wheeler-Howard Act* authorizes the issuance of a constitution to Indians residing on a reservation for purposes of self-government. This same statute also authorizes the formation of business corporations by Indians on a reservation to engage

in commercial enterprises. Thus, on any Indian reservation you can find three types of legal entities asserting rights of "self-government". There may exist (1) a municipal government with a constitution and by-laws, (2) a business corporation with a charter and by-laws, or (3) a continued legal entity succeeding to the legal rights of the aboriginal tribe. 65 Dec. of Dept. Int. 483. This court summarized the legal history of the relationship between the Indians and the states in *Village of Kake v. Egan*, 369 U.S. 60, 71-75 (1962). Added to the limitations upon reservation self-government outlined above is the fact that, under certain circumstances, the federal courts have jurisdiction to review tribal court decisions relating to matters of internal self-government. *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965).

Granting the "police power" of the *Wheeler-Howard Act* organizations and the "tribe" over the reservation (subject only to the power of Congress to legislate in this area and the possibility of review in federal courts), off-reservation fishing and hunting is a matter extra-territorial. It must, therefore, be grounded in the survival of some *right* guaranteed to the aboriginal tribe or band of Indians whose rights have been succeeded to a presently existing tribe or band of Indians *other* than the municipal corporations or business corporations referred to above.

With this background in mind, the logical starting point in an analysis of the legal significance of Indian treaties is the relationship between the In-

dians and the federal government *prior to the execution of those treaties.*

At the outset, it must be granted that the Indians did not have the ability to understand the common-law concepts of private property. An Indian's "rights" were communal in nature with all other members of the tribe or band with which he was associated. *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302 (1893) articulates this concept:

> "The distinctive characteristics of communal property is that every member of the community is an owner of it as such. He doesn't take as heir, or purchaser, or grantee; if he dies, right of property doesn't descend; if he removes from the community it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property in the land as perfect as that of any other person; and his children after him will enjoy all that he enjoyed, not as heirs but as communal owners."

When the United States began to preempt the Indians' aboriginal "use and occupancy" of the North American continent by permitting non-Indian settlement of the land, the question quite naturally arose as to the relative rights of the United States, or its grantees, and the Indians to the soil then aboriginally occupied by the tribes and bands.

Johnson v. McIntosh, 21 U.S. 543, 584, 5 L. Ed. 681 (1823) is the leading opinion of this Court discussing this question.

> ". . . Thus, all the nations of Europe, who have acquired territory on this continent, have asserted in themselves, and have recognized in

others, the exclusive right of the discoverer to appropriate the lands occupied by the Indians. Have the American states rejected or adopted this principle?

"By the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the government, but to the 'property and territorial rights of the United States,' whose boundaries were fixed in the second article. *By this treaty, the powers of government, and the right to soil, which had previously been in Great Britain passed definitively to these states.* We had before taken possession of them, by declaring independence; but neither the declaration of independence, nor the treaty confirming it, could give us more than that which we before possessed, or to which Great Britain was before entitled. It has never been doubted, that either the United States, or the several states, had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it." (Emphasis supplied.)

The emphasized language takes on added meaning in light of Chief Justice Marshall's discussion of the patents by the Crown of Great Britain to the American colonies at page 579 of the opinion:

"These various patents cannot be considered as nullities; nor can they be limited to a mere grant of the powers of government. *A charter intended to convey political power only, would never contain words expressly granting the land, the soil and the waters.*" (Emphasis supplied.)

By this statement, it is clear that it was this Court's position that the United States succeeded to all of the sovereign or governmental rights of Great Britain over the lands described in the treaty of peace ending the Revolutionary War. Even more significant is the statement that the words conveying only political powers "would never contain words expressly granting the land, the soil and the waters". Therefore, the grantor (Great Britain) must have conveyed to the grantee (the United States) both the governmental and proprietary rights to the lands ceded by the treaty of peace ending the Revolutionary War. It was expressly held that the United States has the power to make grants of soil occupied by Indians to private individuals and, by patent, to convey clear title in fee simple absolute. This is inconsistent with the notion that the Indian possessed "title" to the lands which they aboriginally occupied which might give them the power to "sell their lands". This concept is clarified in *Johnson v. McIntosh, supra*, at pages 587-88:

> "The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. *They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest;* and gave also a right to such a degree of sovereignty as to the circumstances of the people would allow them to exercise. The power now possessed by the government of the United States to grant lands, resided, while we were

> colonies, in the crown or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence o(f) any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive title, or at least a title which excludes all others not compatible with it. All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians." (Emphasis supplied.)

The conclusion to be reached is that the United States possesses the power to grant to its citizens or any resident all right, title and interest to lands aboriginally occupied by Indian tribes. It is submitted that the Indians had no legal right to be compensated for their aboriginal use and occupancy. They could merely hope that political or moral considerations would lead the United States to grant them title to land. *The aboriginal use and occupancy of the Indian tribes amounts to nothing more than a common-law tenancy at sufferance, where their occupancy is not a technical trespass and, therefore, not adverse to the paramount title vested in the United States.*

Has the doctrine of *Johnson v. McIntosh, supra,* been rejected, modified or affirmed by subsequent judicial construction? *Tee-Hit-Ton Indians v. United*

States 348 U.S. 272 (1955) expressly adopted Marshall's rationale with the following language:

". . . (a) The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." (page 279)

. . . .

"This leaves unimpaired the rule derived from *Johnson v. McIntosh* that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment." (pages 284-85)

. . . .

"No case in this Court has ever held that taking of Indian title or use ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek

> to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willing made to allow tribes to recover for wrongs as a matter of grace, not because of legal liability. 60 Stat. 1050." (pages 281-82)
>
> . . . .
>
> "The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation." (pages 288-89)

In footnote 21 to its opinion, the Court added: "The Departments of Interior, Agriculture and Justice agree with this conclusion. See Committee Print No. 12, Supplemental Reports dated January 11, 1954, on H.R. 1921, 83rd Cong., 2d Sess. . . . ."[2]

From the foregoing, it is clear that a treaty between the United States and Indian tribes could not operate as a recognition or reservation of "aboriginal title".[3] Yet, it was precisely this notion that the Court relied upon, with no citation of authority to support its position, in *United States v. Winans*, 198 U.S. 371 (1905) to describe the nature of off-

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[2]The rationale of the *Tee-Hit-Ton* case, *supra*, has been followed by the lower federal courts. *Cowlitz Tribe of Indians v. City of Tacoma*, 253 F.2d 625 (9th Cir., 1957); *Prairie Band of Potawatomi Indians v. United States*, 165 F. Supp. 139 (Ct. Cl. 1958) and *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906 (Ct. Cl. 1963).

[3]At least one commentator disagrees with the rationale of *Tee-Hit-Ton v. United States*, *supra*, and argues the "menagerie theory" of the legal relationship of the Indian tribes to the land. Cohen, *The Legal Conscience*, pp. 273, et seq.

reservation fishing rights at "usual and accustomed" grounds under the Treaty with the Yakama, 12 Stat. 951 (1855).

At page 381, the Court stated:

> ". . . In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."

Based on the assumption that the treaty operated as a reservation of "aboriginal title" the court went on to characterize the off-reservation fishing "right" as an easement at page 384:

> ". . . Nor does it (the treaty) restrain the State unreasonably, if at all, in the regulation of the right. It only fixes in the land such easements as enables the right to be exercised."

The language of the Court in the *Winans* case, *supra*, is obviously inconsistent with the fundamental theory of Indian title. *Johnson v. McIntosh*, *supra*; *Tee-Hit-Ton Indians v. United States*, *supra*.

Unfortunately, characterizing the "usual and accustomed" ground provision of the treaties as a common-law easement by the judiciary subsequent to the *Winans* decision, *supra*, has occurred without regard to the fact that its rationale of "original Indian title" has been completely rejected. *Maison v. Confederated Tribes of Umatilla Indian Reservation*, 314 F.2d 169 (9th Cir. 1963) illustrates the expectable results if the *Winans* doctrine is carried to its logical and ultimate conclusion. In this case, the Umatilla Indians sought a declaratory judgment of their off-reservation fishing rights on the Colum-

bia River and its tributaries and an injunction against the application of state conservation laws and regulations by the Oregon State Game Commission. The Circuit Court of Appeals upheld the issuance of the injunction holding that the state had failed to meet the burden of proving that the application of its conservation laws was "indispensable" to the preservation of the fishery resource. To support this conclusion the court relied on *United States v. Winans, supra, Tulee v. Washington*, 315 U.S. 681 (1942) and *Makah Indian Tribe v. Schoettler*, 192 F.2d 224 (9th Cir. 1951). It was the opinion of the court that the Indians "reserved" their aboriginal rights to the fishery resource when they "granted" the lands they aboriginally used and occupied to the United States by execution of a treaty. The only qualification to this theory is that the "citizens of the Territory" might share in the enjoyment of the resource with the Indians. By placing the Indians in the position of "grantor", the non-Indians must thereby be relegated to the position of mere licensees. The court supported this theory by its interpretation of the dicta in the *Tulee* case, *supra*,

> "that, while the treaty leaves the state with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here." (315 U.S. at 684)

The court stated at page 172 of the *Umatilla* opinion, *supra*:

> "Thus, in both the *Tulee* and *Makah* cases it was held that the Indian's right to fish is qualified by the state's right to regulate such fishing when necessary for conservation. But, to establish necessity the state must prove two facts: *first*, that there is a need to limit the taking of fish, *second*, that the particular regulation sought to be imposed is 'indispensable' to the accomplishment of the needed limitation."[4]

In order to meet this burden of proof, the state must show that there are no alternative means of preserving the fishery resource. This means that the state would have to show a total closure of both sport and commercial non-Indian fisheries *and* a continuing decline in the fishery population to such an extent that the very preservation of the resource itself was at stake before it could apply its conservation regulations to a treaty Indian fishing at his "usual and accustomed" fishing grounds. The Indians would be in the advantageous position of having a prior vested right to the entire anadromous fishery resources of the Pacific Northwest because the "usual and accustomed" language is found in all of the Indian treaties executed in the states of

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[4]Webster's Third International Dictionary, unabridged, 3rd Ed., 1963, defines "indispensable" as follows:

> "1. that cannot be set aside or neglected or disregarded; 2, that cannot be dispensed with: that is absolutely necessary or requisite or essential: that cannot be done without."

Washington, Oregon, and Idaho.[5] State regulations could only be justified on the basis of protection of Indian fishing.

Tulee v. Washington, *supra*, does not support the position taken by the court in the *Umatilla* decision for two reasons. First, *Tulee* uncritically accepts the rationale of the *Winans* decision contrary to the theory of aboriginal title as held by this Court in *Johnson v. McIntosh*, *supra*, and reaffirmed by this Court in *Tee-Hit-Ton Indians v. United States*, *supra*. Second, *Tulee* held that it was not proper for the state to charge an Indian a fee for a fishing license where the revenues so derived were to be used for the general support of state government rather than being related to a conservation program. The language relied upon by petitioners (necessary for conservation) is merely dicta and certainly unnecessary to the holding of the case.

The adoption of the *Winans* philosophy of original Indian title and the imposition of the burden of proving "indispensability" upon the state by the

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[5]This "usual and accustomed" language, without significant variation, is found in the following treaties: Treaty with the Nisqually et al, Nov., 1854, 10 Stat. 1132; Treaty with D'wamish, Suquamish and other Indians, Jan. 22, 1855, 12 Stat. 927; Treaty with S'Klallam Indians, Jan. 26, 1855, 12 Stat. 1933; Treaty with Makah Indians, Jan. 31, 1855, 12 Stat. 939; Treaty with Walla Walla, Cayuses, and Umatilla Indians, June 9, 1855, 12 Stat. 945; Treaty with Yakima Indians, June 9, 1855, 12 Stat. 951; Treaty with Nez Perce Indians, June 11, 1855, 12 Stat. 957; Treaty with Tribes of Indians of Middle Oregon, June 24, 1855, 12 Stat. 963; Treaty with Quinaielt and Quillehute Indians, July 1, 1855, 12 Stat. 971; Treaty with Flathead, Kootnay and Upper Pend d'Oreilles Indians, July 16, 1855, 12 Stat. 975.

Ninth Circuit Court of Appeals is directly inconsistent with this Court's decision in *New York ex rel. Kennedy v. Becker*, 241 U.S. 556, 563-64 (1916):

> ". . . We do not think that it is a proper construction of the reservation in the conveyance to regard it as an attempt either to reserve sovereign prerogative or so to divide the inherent power of preservation as to make its competent exercise impossible. Rather are we of the opinion that the clause is fully satisfied by considering it a reservation of a privilege of fishing and hunting upon the granted lands in common with the grantees, and others to whom the privilege might be extended, but subject nevertheless to that necessary power of appropriate regulation, as to all those privileged, which inhered in the sovereignty of the State over the lands where the privilege was exercised. . . ."
>
> ". . . We also assume that these Indians are wards of the United States, under the care of an Indian agent, but this fact does not derogate from the authority of the State, in a case like the present, to enforce its laws at the locus in quo. *Ward v. Race Horse, supra; United States v. Winans, supra.*"

Ward v. Race Horse, 163 U.S. 504 (1896) likewise upholds the proposition that a state possesses the sovereign or governmental authority to Indian hunting and fishing outside the boundaries of an Indian reservation. Significantly this case was cited with approval by this Court in *Village of Kake v. Egan*, 369 U.S. 60, 75-76 (1962):

> "Even where reserved by federal treaties, off-reservation hunting and fishing rights have been held subject to state regulation, *Ward v.*

Race Horse, 163 U.S. 504; *Tulee v. Washington*, 315 U.S. 681, in contrast to holdings by state and federal courts that Washington could not apply the laws enforced in *Tulee* to fishing within a reservation, *Pioneer Packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557; *Moore v. United States*, 157 F.2d 760, 765 (C.A. 9th Cir.). See *State v. Cooney*, 77 Minn. 518, 80 N.W. 696.

"True, in *Tulee* the right conferred was to fish in common with others, while appellants here claim exclusive rights. But state regulation of off-reservation fishing certainly does not impinge on treaty-protected reservation self-government, the factor found decisive in *Williams v. Lee*. Nor have appellants any fishing rights derived from federal laws. This Court has never held that States lack power to regulate the exercise of aboriginal Indian rights, such as claimed here or of those based on occupancy. Because of the migratory habits of salmon, fish traps at Kake and Angoon are no merely local matter."

The *Kake* case, *supra*, establishes that the state (1) may apply its conservation laws to Indians who are beneficiaries of a treaty insofar as their off-reservation fishing activities are concerned, and, (2) may apply its conservation laws to Indians who claim special privileges based on aboriginal use and occupancy or "original Indian title".

The burden of proving "indispensability" as articulated by the Ninth Circuit Court of Appeals in the *Umatilla* case, *supra*, amounts to a presumption that state conservation laws are unconstitutional in their application to the appellants who fish commercially with efficient, modern gear at their "usual ac-

customed" grounds with such a devastating effect upon the fishery resource as shown by this record. This notion is not only inconsistent with the cases discussed herein, but also with the fundamental presumption that all state laws are valid so long as they are not constitutionally objectionable. A serious breakdown in law-enforcement has been experienced and may be expected to continue so long as the nature of "original Indian title" is misunderstood. The anadromous fishery resource would be placed in jeopardy.

II. *Assuming Arguendo, That Treaty Indians Possess Special Rights to Fish Outside Their Reservation Boundaries, The "Reasonable and Necessary" Test Affords Recognition of Indian Rights and Yet Allows Conservation of The Anadromous Fishery Resource.*

Without abandoning what respondents believe to be the proper interpretation of the treaty, we submit that the only workable standard to be applied is that used by the court below if Indians are held to have a qualified immunity from state conservation laws.

The Washington Supreme Court quoted with approval from *Tulee v. Washington*, 315 U.S. 681 (1942):

> ". . . . The appellant (Tulee), on the other hand, claims that the treaty gives him an unrestricted right to fish in the 'usual and accustomed places,' free from state regulation of any kind. We think the state's construction of the treaty is too narrow and the appellant's too broad; that, while the treaty leaves the state

> with power to impose on Indians, equally with others, such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish, it forecloses the state from charging the Indians a fee of the kind in question here."

Further, the court quoted with approval from *Organized Village of Kake v. Egan*, 369 U.S. 69 (1960). *State v. McCoy*, 63 Wn.2d 421, 387 P.2d 942 (1963).

In the instant case and in *Department of Game v. Puyallup Tribe, Inc.* October Term, 1967, Docket No. 247, the Washington Supreme Court followed the *McCoy* standard.

This concept permits unified management of the resource and yet grants to the Indians a "special right" not accorded to other citizens.[6]

The holding of the Idaho Supreme Court in *State v. Arthur*, 74 Idaho 251, 261 P.2d 135 (1953), Cert. denied, 347 U.S. 937 (1954) that a state has no power to regulate off-reservation hunting (and fishing) is demonstrably unsound, as this court has never overruled *Ward v. Race Horse*, 163 U.S. 504 (1896) and *New York ex rel. Kennedy v. Becker*, 241 U.S. 556 (1916)[7].

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[6]It is interesting to note that two judges of the *McCoy* court would limit the Indian "right" to the use of aboriginal fishing equipment. *State v. McCoy*, 63 Wn. 2d 421 at 439 (1963).

[7]This was recognized by a commentator in Hobbs, "Indian Hunting and Fishing Rights" 32 George Washington L. Rev. 504 (1964).

Maison v. Confederated Tribes of the Umatilla Indian Reservation, 314 F.2d 169 (9th Cir. 1963) enunciates an unsound rule from the standpoint of conservation of the anadromous fishery resource[8].

III. *No Act of Congress or other Statute deprives State Courts of Jurisdiction over Indian Treaty Rights.*

Petitioners assert that control over an Indian enjoying a treaty right to fish outside a reservation has been preempted by the Federal Government and, therefore, the state has no jurisdiction over this matter. They rely on an analogy to the doctrine of preemption as applied in labor law and the doctrine of supersession as applied in *Pennsylvania v. Nelson*, 350 U.S. 497 (1955).

Petitioners mis-construe the nature of the theories and, therefore, misapply them. Neither theory has application here.

Pennsylvania v. Nelson, supra, held that the Smith Act superseded the enforceability of the Pennsylvania Sedition Act. The three tests of supersession are:

> "*First*, '(t)he scheme of federal regulation (is) so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.' " (350 U.S. at 502)
>
> "*Second*, the federal statutes 'touch a field in which the federal interest is so dominant that the federal system (must) be assumed to preclude enforcement of state laws on the same subject.' " (350 U.S. at 504)

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[8]See argument, infra, pp. 26 to 28.

> "*Third*, enforcement of state sedition acts presents a serious danger of conflict with the administration of the federal program." (350 U.S. at 505)

The companion doctrine of preemption in labor law was explained in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) at page 245:

> ". . . When an activity is originally subject to section 7 or section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

Supersession merely means that Congressional action in a field overrules any state activity in that area and makes state remedies or sanctions inoperative. Preemption ousts all state jurisdiction, or as *Garmon, supra*, points out, jurisdiction of all bodies save the N.L.R.B. is ousted in the field.

Petitioners argue that state control has been done away with by Congressional action. However, they fail to point to any Congressional act that meets the tests set forth in *Pennsylvania v. Nelson, supra*. Congress has *never* evidenced any intention that a national policy is to govern fishing by treaty Indians off their reservations. We are faced here with a total absence of Congressional action regarding off-reservation tribal fishing rights.

Petitioners rely on Public Law 280 (67 Stat. 588) and argue that Section 2 (6) (18 U.S.C. 1162 (6)) prohibits the state from regulation of fishing by treaty tribes. We would point out that Public

Law 280 is concerned with Indian country-reservations and trust lands. The instant case is concerned with a controversy over *off-reservation* fishing by certain individuals who may not be entitled to some special legal privilege (the precise quantum of which is yet to be determined).

18 U.S.C. 1162(b) provides:

> "shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

Instead of granting a treaty tribe any special rights, the statute says only that there shall be no impairment of any such rights (if such exist as a matter of law).

Since petitioners assert that the Federal Government has pre-empted the field, it is incumbent upon them to show that the tests laid down in *Pennsylvania v. Nelson and Garmon, supra,* have been met. This they cannot do, for there is no such legislation.

Nor does the subject matter of this action lend itself to Federal control. It has long been established law that the states have a special interest in the conservation of the fish and wildlife resources for equal enjoyment by all citizens. *Geer v. Connecticut,* 161 U.S. 519 (1896).

CONCLUSION

Respondents request that this Court interpret the language of the treaty "in common with the citizens of the Territory" to mean that Indians are entitled, outside the boundaries of a reservation, to the same rights, privileges, and obligations as are all other citizens; and that the injunction issued by the court below be affirmed.

Respectfully Submitted,

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